IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 188

ROBERT BALDWIN,

Appellant,

against

NEW YORK,

Appellee.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

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Interest of *Amicus*

Section 40 of the New York City Criminal Court Act provides that trials for misdemeanor charges carrying a maximum sentence of one year shall be conducted without a jury, but that defendants may request a trial before a panel of three judges.

Summary trials for certain offenses have been part of national and New York tradition since the colonial period. As this Court pointed out in *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), such trials were based upon the need for simplified judicial administration and rapid disposition of pending charges against defendants. These considerations are particularly compelling in New York City where 321,368 non-traffic misdemeanor cases were handled by 78

judges in the period from July, 1966 through December, 1968.*

As the chief legal officer of the State (New York Executive Law § 63), charged with the defense of enactments of our State Legislature (Executive Law § 71), the Attorney General is concerned with preserving the effectiveness and the constitutionality of State legislation. The procedure outlined in § 40 sets out a fair fact-finding process, which has resulted in an acquittal rate of approximately 49%.** Thus, the statute at issue insures the earliest possible hearing for defendants and, at the same time, preserves all essential elements of due process.

Moreover, the Attorney General is one of the appellees in the case of *Marvin Puryear* v. *Frank S. Hogan, District Attorney of N. Y. County and Louis Lefkowitz, Attorney General of the State of New York,* 24 N. Y. 2d 207 (1969) (Jurisdictional Statement filed in this Court on or about May 21, 1969), which also challenges the constitutionality of Sec. 40 of the New York City Criminal Court Act and which was decided by the Court below together with the instant case.

The Attorney General agrees with and fully endorses the position taken by the District Attorney of New York County in his brief in the within action with respect to his defense of the New York statute.

Questions Presented

1. Whether § 40 of the New York City Criminal Court Act, which precludes trial by jury in the New York City Criminal Court in misdemeanor cases punishable by sen-

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* Opinion of the Court below, 24 N. Y. 2d 207, 218 (1969).

** For example, there were 5,072 misdemeanor trials (excluding traffic offenses) in the New York City Criminal Court from January to June of 1968; of these, 2,286 led to acquittals (Records of the Director of Statistics of the Criminal Court of the City of New York).

tence of up to one year, violates the Sixth Amendment to the United States Constitution and the due process guarantees of the Fourteenth Amendment.

2. Whether § 40 of the New York City Criminal Court Act, which precludes jury trials in the New York City Criminal Court in misdemeanor cases punishable by a sentence of up to one year, deprives appellant of equal protection of the laws under the Fourteenth Amendment because misdemeanor cases in other counties may be tried by a six-man "jury".

ARGUMENT

1. Section 40 of the New York City Criminal Court Act, which provides non-jury trials for misdemeanor charges carrying a maximum sentence of one year, is in harmony with the Sixth and Fourteenth Amendments to the United States Constitution.

A. Appellant maintains that New York's historical distinction between misdemeanors and felonies cannot be the basis for determining whether a criminal offense must be triable by a jury, because summary treatment under the common law was confined to such offenses as "disorderliness, drunkenness, vagrancy . . ."* However, it can be readily demonstrated that it was not the name of the crime which determined its treatment under the common law, but rather, the community view of that crime as shown by the sentence and other consequences attached to it.

For example, at the beginning of the 19th century, English law prescribed capital punishment for 220 to 230 offenses ranging from "the stealing of turnips to associating with gypsies, to damaging a fish pond, to writing threaten-

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* Appellant's brief, p. 20.

ing letters, to impersonating out-pensioners at Greenwich Hospital . . .". Arthur Koestler, "Reflections On Hanging", p. 13 (1956). While in the present day, associating with gypsies might be of anthropological interest and impersonating an out-pensioner might be a nuisance, the English common law regarded these acts as warranting a jury trial because conviction resulted in imposition of the death penalty.

Viewed from a contemporary vantage point, "[t]here was no unifying consideration as to the type of criminal offense subjected to summary trial . . ." Frankfurter and Corcoran, "Petty Federal Offenses and the Constitutional Guarantee of Trial By Jury," 39 Harv. L. Rev. 917, 927 (1926). Included among the acts punishable as misdemeanors and tried summarily were "perjury, battery, libel, conspiracy, and public nuisance." *Russell On Crime,* Vol. 1, p. 6 (12th Ed. 1964). See also *Stephen's Digest Of Criminal Law,* pp. 284-285 (9th Ed. 1950).

Thus, it is clear that the "imprecise"* boundary between serious crimes and petty offenses cannot be determined merely by tracing a particular crime, such as larceny, to determine whether it was tried at common law with or without a jury. The crucial consideration is whether a particular crime is now viewed and punished as a misdemeanor or as a serious offense. The common law, especially that of the American colonial period, is relevant in demonstrating that the misdemeanor felony-distinction has existed for two centuries and has always governed the disposition and trial of conduct classified at a particular time as petty. Cf. *Schick* v. *United States,* 195 U. S. 65, 68-72 (1904).

New York law, under the indicia suggested by this Court in *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), demonstrates that the serious crimes requiring a jury trial at common

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* *Duncan* v. *Louisiana,* 391 U. S. 145, 159 (1968).

law are classified as felonies and carry sentences exceeding one year as well as grave civil disabilities, including permanent loss of the right to vote, the right to public office and the right to practice certain professions. New York Penal Law § 10.00(5); New York Election Law § 152.

The 1967 revision of the New York Penal Code by the legislature, which reduced certain felonies to misdemeanors and certain other criminal offenses to violations, indicates that those crimes which remain felonies are the only ones which are considered serious in the eyes of the community and are punished accordingly.

Appellant suggests that New York's practice with respect to misdemeanors may not be used as a guideline by this Court because (1) it is based upon "lack of concern of the aristocratic power structure for the rights of the lower classes"* and (2) "it was an experience unrepresentative of the practice throughout the other colonies and could not have been within the contemplation of the drafters of the amendment."**

For the first proposition, appellant cites Goebel and Naughton, *Law Enforcement in Colonial New York*, 379 (1944). This text does not purport to compare New York with other states, but merely points out that transported offenders and indentured servants, as well as certain economic factors, created a vagrancy problem. In point of fact, this problem was common to all the colonies and summary powers were invoked in a number of jurisdictions to deal with the crimes resulting from these social factors. New Jersey, Pennsylvania, and Virginia are examples. Frankfurter and Corcoran, *supra*, pp. 950, 955, 962. See

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* Appellant's brief, p. 17.

** Appellant's brief, p. 19.

also *State* v. *Maier*, 13 N. J. 235, 9 A. 2d 21, 34-35 (1953). As pointed out in Frankfurter and Corcoran, at p. 933:

> "The settled practice in which the founders of the American Colonies grew up reserved for the justices innumerable cases in which the balance of social convenience, as expressed in legislation, insisted that proceedings be concluded speedily and inexpensively."

The history of New York State shows a consistent concern for the preservation of all the due process rights which were cherished as a legacy of the English common law. The New York Constitution of April 20, 1777 recognized that no citizen was to be deprived of any rights or privileges unless by the law of the land or the judgment of his peers. In 1787, a 13 point bill was passed which was, in effect, a declaration of rights and safeguarded all New York residents against arbitrary arrest and excessive fines or cruel punishments, as well as providing for free elections so that the legislature could express the will of the majority. See, *e.g.*, *"The Birth of the Bill of Rights"*, by Robert Rutland, Institute of Early American History and Culture (1955) at pp. 62 and 99.

Far from being "unrepresentative of the practice throughout the other colonies", New York's one-year cut-off point is utilized in many jurisdictions. Since a jury as defined by this Court in *Patton* v. *United States*, 281 U. S. 276, 288 (1930), must consist of 12 men rendering a unanimous verdict, it can readily be seen that a large number of states would be affected if the Sixth Amendment's guarantee of a right to jury trial applied to offenses punishable by up to one year's imprisonment. As indicated in Appellant's Appendix A, 9 states provide juries of fewer than 12 persons for crimes punishable by maximum sentences of one year. In 8 others, jury trials are provided only on appeal for persons who have previously been convicted after a trial without jury, in offenses carrying

a one-year term (*cf. Callan* v. *Wilson,* 127 U. S. 540, 557 [1888]). In addition, four states permit non-unanimous verdicts as to offenses carrying a penalty of one year.

In an attempt to evade the fact that New York City's practice is in harmony with "the existing laws and practices in the Nation",* appellant proposes in a footnote that he merely be granted "some form of adjudication by his peers."** The problems posed by this suggestion are manifold. If 12 jurors are not necessary, would 3 be sufficient? (Defendants may presently elect 3-judge panels in the New York City Criminal Court.) How many peremptory challenges will be permitted? How many challenges for cause? At what stage must such a jury be made available? Appellant's suggestion not only requires reversal of this Court's decisions in *Patton* v. *United States, supra,* and *Thompson* v. *Utah,* 170 U. S. 343 (1898), but also would initiate endless new litigation as to innumerable permissible variations on appellant's formula.

However, this Court indicated in *Duncan* v. *Louisiana, supra,* 391 U. S. at p. 158, n. 30, that the invalidation of non-jury trials as to those sentenced to two years' maximum imprisonment would have no far-reaching effect on the states:

> "It seems very unlikely to us that our decision today will require widespread changes in state criminal process . . . [M]ost of the states have provisions for jury trials equal in breadth to the Sixth Amendment, if that amendment is construed, as it has been, to permit the trial of petty crimes and offenses without a jury. Indeed, there appear to be only four states in which juries of fewer than 12 can be used without the defendant's consent for offenses carrying a maximum penalty of greater than one year. Only in Oregon and

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* *Duncan* v. *Louisiana, supra,* 391 U. S. at 160 (1968).

** Appellant's brief, p. 14, n. 10 (commencing on p. 13).

> Louisiana can a less-than-unanimous jury convict for an offense with a maximum penalty greater than one year.''

This comment is significant not only because of its assumption that a 12-man unanimous jury is required where the Sixth Amendment is applicable, but also because it uses one-year penalties as its reference point. This logical reference point is also noted in *DeStefano* v. *Woods,* 392 U. S. 631, 633 (1968).

B. Appellant implies that 18 U.S.C. § 1, which provides that petty offenses are a class of misdemeanors with a six-month maximum sentence, must be followed as a guideline by all the states.* However, Congress appears to have drawn the line somewhat arbitrarily at six months in an attempt to describe a type of misdemeanor rather than to define the maximum constitutional limitation of sentences for offenses tried without a jury. *Duke* v. *United States,* 301 U. S. 492 (1937). The legislative history of 18 U.S.C. § 1 suggests that Congress was of the view that offenses punishable by imprisonment of at least one year could constitutionally be tried in the federal courts without a jury, and settled upon six months in order to fall well within constitutional requirements. See 72 Cong. Rec. 9992 (1930).

Indeed, New York's one-year dividing line between serious and petty offenses relates to a number of existing federal statutes. The constitutional right to be indicted by a Grand Jury, for example, applies only to offenses punishable by more than one year's imprisonment. See *Schick* v. *United States, supra,* 195 U. S. at p. 68; *Duke* v. *United States, supra,* discussing Criminal Code § 335, c. 321, 35 Stat. 1088, 1152, enacted 1909, eff. 1910; Fed. Rules Crim. Proc. 7(a).

Other statutes revolving around a one-year division are the Omnibus Crime Control and Safe Streets Act of 1968,

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*Appellant's brief, p. 12.

18 U.S.C. § 2516(2), authorizing wire tapping by State court order in investigation of crimes punishable by more than one year's imprisonment; the Jury Selection and Service Act of 1968, 28 U.S.C. § 1865(b)(5) disqualifying for service on grand and petit juries only those who have been convicted of a crime carrying more than a one-year sentence; and 18 U.S.C. §§ 922(c), (e), (f) (1968), making it a federal crime to sell, receive or ship firearms through interstate commerce to persons under indictment or convicted of a crime punishable in any jurisdiction by imprisonment for a term exceeding one year.

Thus, it is indisputable that New York's historical evaluation of crimes punishable by a one-year maximum as petty is far from unique; indeed, it has been sanctioned not only by state legislatures, but in several instances by the United States Congress.

2. Appellant has not been deprived of equal protection of the laws by virtue of the availability of six-man "juries" to misdemeanants outside of New York City.

A. Appellant also contends that since he could have a six-man jury trial if he had been prosecuted for a misdemeanor outside of New York City, denial of a jury under § 40 of the New York City Criminal Court Act deprives him of equal protection of the laws. He adds that "the caseload of the New York City Criminal Court does not provide a constitutionally sound rationale for approving that discrimination."*

As pointed out by the Court below, this Court disposed of such a claim in *Salsburg* v. *Maryland*, 346 U. S. 545, 551 n. 6 (1954), quoting from the earlier decision in

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*Appellant's brief, p. 41.

Missouri v. *Lewis*, 101 U. S. 20, 31 (1879). This Court held:

> "There is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. *This would not, of itself within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the law.* * * * *It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.* (emphasis added)
>
> "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State."

Appellant's attempt to distinguish *Missouri* v. *Lewis*, *supra*, is completely unsuccessful. He contends:

> "In *Missouri* v. *Lewis*, *supra*, a statute that provided a different appellate court for appeals from circuit courts in the City of St. Louis and its adjoining

> counties than for the rest of the State was held not to violate the Equal Protection Clause . . . Thus, as the dissent below pointed out, the *Lewis* case would be support for the majority's conclusion only 'if Missouri had denied appeals from St. Louis courts while providing for them in all other parts of the State of Missouri.' "*

Appellant overlooks the fact that trial by jury is merely one mode of arriving at a just and fair decision in a criminal case. This Court made clear in *Duncan* (391 U. S. at 149, n. 14):

> "Of each . . . [determination] that a constitutional provision originally written to bind the Federal Government should bind the states as well it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States.
>
> When the inquiry is approached in this way the question whether the states can impose criminal punishment without granting a jury trial appears quite different from the way it appeared in the older cases opining that states might abolish jury trial. . . . A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems. Yet, no American State has undertaken to construct such a system."

Justice White's analysis unequivocally states that juries and fundamental fairness are neither equivalent nor inseparable. Indeed, the concept of fundamental fairness in determining the facts bears no immutable relationship to

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* Appellant's brief p. 41.

the question of the body to make the determination. Factual findings may be made by juries of various sizes, administrative hearing officers and boards, joint boards including legal officers and laymen.

Statistics indicate that almost half of the defendants in the New York City Criminal Court who go to trial are acquitted. From January to June of 1968 there were 5,072 misdemeanor trials (excluding traffic offenses) in the New York City Criminal Court. Of these, 2,786 led to convictions while 2,286 led to acquittals.* It should also be noted that under Section 40 of the New York City Criminal Court Act, the defendant has a right to a trial before three judges of that Court. In the representative year of 1964, such three-judge panels tried 11,678 cases to conclusion, resulting in 7,136 convictions.**

Thus, New York State's procedure does not deprive City residents of a fair fact-finding process, but only provides a different form for arriving at a conclusion in a criminal case. *Missouri* v. *Lewis* remains relevant in evaluating this process.

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* See Records of the Director of Statistics of the Criminal Court of the City of New York.

The president of the Legal Aid Society in New York City recently reported that 49% of the Society's clients who were tried in the New York City Criminal Court in 1967 (without a jury) were acquitted; there were 3,023 convictions after trial, 2,678 acquittals after trial. Speech at annual Judicial Conference of the Second Judicial Circuit of the United States, Lake Placid, N. Y. September 14, 1968, reprinted in N. Y. Law Journal, September 25, 1968, p. 1.

Although no figures are presently available on a state-wide level as to the percentage of acquittals after 6-man jury trials in misdemeanor cases, it is unlikely that such percentages would be more favorable to defendants than the acquittal rate in the New York City Criminal Court. For example White Plains had six such jury trials in the period from July 1, 1968 to June 30, 1969. All resulted in convictions. (Yearly Report of Edwin Van Tassel, Chief Clerk, City Court, White Plains, New York.)

** Annual Report of the New York City Criminal Court (1964), Table 1, pp. 12-17.

Moreover, if the mere difference in procedure were to result automatically in a violation of equal protection of the laws, a number of anomolous situations would arise. For example, a criminal defendant charged with the commission of a Class B misdemeanor, carrying an authorized three-month prison term, is afforded a jury trial outside of New York City, *New York Uniform District Court Act*, § 2011; *New York Uniform City Court Act* § 2011. Adherence to appellant's rationale would mean that if Class B misdemeanor cases carrying a three-month sentence are not tried by a jury in New York City, New York defendants would be deprived of constitutional rights.

And, of course, equalization of the rights of defendants outside of New York could also be accomplished by merely abolishing all forms of jury trial for misdemeanants outside New York City.

Thus, it is clear that the more liberal provisions for six-man juries in some areas of New York State are totally irrelevant to any of appellant's constitutional rights. If *Duncan* v. *Louisiana* should be applied so as to invalidate § 40 of the New York City Criminal Court Act, then the juries provided outside New York City would also be inadequate, since they are not the common law jury required by this Court in *Patton* v. *United States, supra*. See also *Duncan* at p. 158, n. 30. If (as shown in Point I, *supra*) *Duncan* does not apply, New York's experimentation with more liberal or different procedures in some areas may not be penalized if it is based upon valid State considerations.

The Court below cited "the overburdening caseload existing in the criminal courts of the highly populated City of New York"* as a reason for upholding the territorial distinction. The figures cited in the opinion support the finding that New York City must be considered in an

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*24 N. Y. 2d 207, 218 (1969).

entirely different category from New York's other population centers:

> "From July, 1966 through December, 1968 the New York City Criminal Court disposed of 321,368 non-traffic misdemeanor cases; whereas in the next largest city, Buffalo, the City Court disposed of 8,189 non-traffic misdemeanor cases. Although it is true that the population of New York City is approximately 15 times as large as Buffalo's, the figures still reflect an enormous disproportion, since New York City's caseload is more than 39 times as great. Moreover, only 78 judges were available in the New York City Criminal Courts to hear those 321,368 misdemeanors whereas in Buffalo there were 12 judges available to hear the 8,189 misdemeanors, a ratio of 6½ to 1, as compared to a caseload ratio of 39 to 1."

B. It is interesting to note that in his attempt to discount the State's obvious interest in efficient judical administration, appellant argues that a "compelling interest" must be shown in order to uphold §40 of the New York City Criminal Court Act.* This suggestion appears in the middle of appellant's argument concerning equal protection of the laws and geographical distinctions. Adoption of appellant's rationale would dispense with this Court's interpretation of the equal protection clause in countless cases throughout this century. *Lindsley* v. *Natural Carbonic Gas Company,* 220 U. S. 61 (1961); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley,* 366 U. S. 582, 591-592 (1961); *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U. S. 522, 528 (1959); *Railway Express Agency, Inc.* v. *New York,* 336 U. S. 106, 110 (1949); *McLaughlin* v. *Florida,* 379 U. S. 184, 191 (1964). See also 82 Harv. L. Rev. 1065, 1076-1132 (1968); 116 Pa. L. Rev. 924, 930 (1963).

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* Appellant's brief, p. 43.

As this Court said in *McGowan* v. *Maryland,* 366 U. S. 420, 425 (1961):

> "The standard under which [equal protection] is to be evaluated has been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if classification rests on grounds wholly irrelevant to the achievement of the State's objective."

A parallel standard has been approved by this Court in analyzing claims of deprivation of due process. See, *e.g., Snell* v. *Wyman,* 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd.* 393 U. S. 323 (1969), where the three-judge district court held (281 F. Supp. at 862, n. 19):

> "Our point is the narrower one that the limited right of substantive due process insures only against the capriciousness reaching a level of irrationality, not against judgments of policy that may be unwise or even 'harsh' in their balancing of competing interests."

Appellant herein asserts that "recent decisions" of this Court demonstrate that "'where rights of fundamental public importance are involved, geographic or other classifications will no longer satisfy the Equal Protection Clause merely because they have a rational basis.'"* However, the decisions cited concern two areas which have explicitly been made exceptions to the traditional equal protection standard. The first of these areas is the right to vote (see

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* Appellant's brief, p. 43.

e.g., Kramer v. *Union Free School District,* 395 U. S. —— [1969], 37 U.S.L.W. 4530 [1969]); the second is the right to travel (*Shapiro* v. *Thompson,* 394 U. S. 618 [1969]). Neither of these cases in any way indicated that this Court was prepared to abandon the carefully defined analysis of *McGowan* v. *Maryland, supra,* and *Lindsley* v. *Natural Carbonic Gas Company, supra.*

Appellant offers no reason for creating a new exception in the case at bar. The fact that a geographic classification has been placed in issue does not, in the absence of a deprivation of the right to vote, establish any particular basis for applying an unusual test of State authority. Nor does the assertion of "public importance" create such a basis; indeed, presumably any colorable claim under the equal protection or due process clauses concerns questions of public importance. This Court has required demonstration of a "compelling interest" under exceptional circumstances where the rights at issue are incidents of national citizenship or intrinsic in the electoral process.

The proper standard in the case at bar must be a showing of a valid State interest. As previously indicated, this Court has already ruled that trial before a judge alone does not result in an absence of fundamental fairness.* *Duncan* v. *Louisiana, supra,* 391 U. S. at 149, n. 14.

The basic reason for proceeding without jury trials under the common law was the benefit "to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications." *Duncan* v. *Louisiana,* 391 U. S. at p. 160. This purpose remains valid today, and is as beneficial to defendants as to the State. Offenses carrying relatively minor sentences must be tried at the earliest possible time in order to protect the innocent from the strain

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* This is further evidenced by appellant's own showing that jury trials are waived in most cases (Appellant's brief, p. 33).

and humiliation of a pending criminal charge. A delay may lodge such a charge against a defendant for a longer period than that for which he could be imprisoned if convicted. Thus, New York's continuation of its common law tradition is both constitutionally permissible and supportive of the interests of justice.

CONCLUSION

The judgment appealed from should be affirmed.

Dated: New York, New York, October 7, 1969.

Respectfully submitted,

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